UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 385
(FREEMAN DECORATING SERVICES, INC.)

and Case 12-CB-208733

DORIS CARABALLO, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Submitted by:
Caroline Leonard, Esq.
Counsel for the General Counsel
National Labor Relations Board
Region 12
201 E. Kennedy Blvd.
Suite 530
Tampa, FL 33602

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I. STATEMENT OF THE CASE

What duty does the operator of an exclusive hiring hall owe to its users to notify them of a lapse in their referral eligibility due to the alleged non-payment of hiring hall fees?

The General Counsel submits that it is established Board law that a labor organization breaches its duty of fair representation when it operates an exclusive hiring hall and denies an employment opportunity to a referent without first notifying them of the deficiency in their referral fees and affording them the opportunity to correct it. Therefore, as alleged in the Complaint and Notice of Hearing issued in this case on April 30, 2018 ("the Complaint"), the evidence adduced at trial shows that International Brotherhood of Teamsters, Local 385 ("Respondent"), violated Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act ("the Act") by failing and refusing to provide the requisite notice and opportunity to hiring hall user Doris Caraballo ("Caraballo"), thereby denying her employment opportunities with Freeman Decorating Services, Inc. ("Freeman").

Notwithstanding the record evidence supporting a violation, on December 19, 2019, the Honorable Christine E. Dibble ("the ALJ" or "ALJ Dibble") issued her Decision in this case, concluding that Respondent did not violate Section 8(b)(1)(A) and (2) of the Act, departing from Board law and relying on inapposite and non-binding Circuit Court of Appeals precedent instead of treating with the core of the allegation: that Respondent owes a fiduciary duty to its referral hall users that its current rules and practices fail to satisfy, to the detriment of Caraballo and unknown others who have chosen, instead of making waves with the controller of their employment opportunities, to accept the way things are. Furthermore, ALJ Dibble made several substantive errors in her factual findings. These errors of fact and law are recited in the Counsel for the General Counsel's Exceptions to the Decision of the Administrative Law Judge ("Exceptions"). For the

reasons set forth herein, Counsel for the General Counsel respectfully requests that these Exceptions be granted, and that the Board conclude as a matter of law that Respondent, as the operator of an exclusive hiring hall, failed to fairly represent Doris Caraballo through its breach of fiduciary duty to her, and that the breach was arbitrary or discriminatory, thereby causing Caraballo to miss work referrals in both November and December 2017,[1] in violation of the Act.

II. QUESTIONS TO BE RESOLVED

The central issues to be resolved are as follows:

1. Exceptions 1 through 44:

Did the ALJ err by making several factual misstatements, mischaracterizations, and omissions regarding Respondent's operation of its hiring hall?

2. Exceptions 45 through 57:

(a) Did the ALJ err by failing to consider *Carpenters Local 573,* 272 NLRB 1249 (1984), or otherwise adequately analyze the "fiduciary duty" theory presented by Counsel for the General Counsel?

(b) Did the ALJ err by concluding that Respondent had established a "necessity defense" to the alleged violation?

(c) Did the ALJ err by failing to conclude that Respondent violated Section 8(b)(1)(A) and 8(b)(2) of the Act by its breach of fiduciary duty to Caraballo when it failed to refer her to work in November and December 2017?

For the reasons set forth below, Counsel for the General Counsel submits that the Questions to Be Resolved must be answered affirmatively.

[1] All subsequent dates herein are in 2017, unless otherwise noted.

III. STATEMENT OF FACTS

A. Respondent's Hiring Hall. Exceptions 1 through 28.

Respondent, a local affiliate of the International Brotherhood of Teamsters, maintains an office in Orlando, Florida, from which it administers between 53 and 55 collective bargaining agreements with employers in several industries, performing representational duties on behalf of about 9,000 employees. [ALJD 2:27-29; Tr. 107-109].[2] Part of Respondent's administrative function is the referral and dispatch of hiring hall users pursuant to different referral lists delineated in the referral hall rules: construction/pipeline, convention, and car haul driveout. [GCX 6; Tr. 37-39, 75, 109-110]. Most directly related to this case is the "convention" referral list maintained and used by Respondent to dispatch approximately 150-300 hiring hall users to a few employers (primarily Freeman[3]) for "showsite" and "warehouse" freight transport work as either general laborers or forklift operators. [ALJD 3 fn. 3; GCX 6-8; Tr. 42, 44-45, 109-110]. The ALJD erroneously found that Respondent has between 53 and 55 collective bargaining agreements with various employers covering employees who work at the site of specific events ("show sites"), an apparent reference the convention industry work. [ALJD 2:29-31]. ALJ Dibble also mischaracterized the nature of Respondent's hiring hall referral system as being "with Freeman." [ALJD 3:4-5].

Respondent's President, Clay Jeffries (Jeffries), estimated that of 53 to 55 collective bargaining agreements administered by Respondent, only four convention employers: Freeman (showsite and warehouse), Shepard, and Arata. [Tr. 109]. Jeffries testified that in addition to these

[2] The Administrative Law Judge's Decision is referenced herein as "ALJD [page number:line number(s)]." The General Counsel's Exhibits and the Respondent's Exhibits are referenced herein as "GCX [number]" and "RX [number]," respectively. References to the hearing transcript are noted herein as "Tr. [page number]."

[3] The ALJ correctly found commerce facts and concluded that Freeman is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. She also correctly found that Respondent is a labor organization within the meaning of Section 2(5) of the Act. [ALJD 2:7-14, 2:20-21].

three companies, from time to time others "come into town" and Respondent makes a new agreement with each as needed. [Tr. 109]. Additionally, Laura[4] Stapleton ("Stapleton"), who at the time of the material events was Respondent's bookkeeper,[5] testified that there is a separate process for Disney,[6] since those employees interview and are hired as regular employees, rather than being referred on an as-needed or "on call" basis as the convention laborers are. [Tr. 39-40]. Thus, the record is very clear that the number of employers contractually obligated to use its convention-industry referral list is far smaller than the 53 to 55 overall contracts administered by Respondent. The ALJ's findings of fact should be corrected to reflect these facts.

Respondent uses a computerized database, TITAN, developed by the International Brotherhood of Teamsters, to coordinate its referral hall functions. [ALJD 4:37-38; Tr. 46, 124-125]. TITAN permits Respondent to create profiles for each hiring hall user, containing contact information, and indicators regarding their skillset, e.g., forklift-certification, Class A commercial driver's license, etc. [Tr. 46]. Another section of the database allows Respondent to record payment of dues or referral hall fees from each hiring hall user. [GCX 9; Tr. 46]. During the material events of this case, Stapleton, the bookkeeper, bore responsibility for inputting dues received into TITAN, while Nidia Grajales ("Grajales"), who held the positions of Union Trustee, Business Agent, and Referral Hall Administrator, made the actual referral calls to individual referents registered for work with the Union. [ALJD 5:14-15, 3:24-26; Tr. 36-37, 75]. However, the ALJ incorrectly found that "Respondent uses a computerized systems [sic], TITAN… [that]

[4] The ALJ inadvertently referred to Stapleton as "Lauren," rather than "Laura." [ALJD 5:24].

5 In January 2018, Stapleton's job and title changed to "insurance pension executive secretary." However, her job duties continue to include assisting Grajalels with the administration of the hiring hall. [Tr. 36-37].

[6] Respondent represents some employees of The Walt Disney Company's division Walt Disney Parks and Resorts U.S., which owns and operates the Disney World resort in Orlando, Florida. The Region has had many cases involving Respondent and Disney. See, e.g., Walt Disney Parks and Resorts U.S. d/b/a Walt Disney World Co., 367 NLRB No. 80 (2019). The Board may choose to take administrative notice of this fact and that this is the meaning of the term "Disney" as it appears in the trial record.

calculates dues and fee payment status based on a preprogrammed algorithm." [ALJD 4:38-5:1]. The word "algorithm" does not appear in the hearing transcript and demonstrates a potentially fundamental misunderstanding of what a database is: a collection of categorized, catalogued information that can generate reports about the information contained in it using various query parameters. [Tr. 59-60]. "Dues and fee payment status" is simply one category of information maintained in the database that can be searched or used as a query parameter for other functions, such as generating a referral list. [ALJD 4:38-5:1].

Being "current" on dues and referral fees is a prerequisite for referral under Respondent's written referral hall rules, which were promulgated on March 18, 2017. [ALJD 3 fn. 4; GCX 6; Tr. 38, 101, 115]. The ALJ correctly found that the prepayment of two months' referral fees is part of the referral rules' initial eligibility for inclusion on the referral lists. [ALJD 3:21-23; GCX 6; Tr. 116]. However, the ALJ erred by finding that "[referral hall f]ee payment allows the referent to appear on a referral list generated that month, and to be referred during any subsequent month." [ALJD 3:23-24]. Rather, as the ALJ notes shortly thereafter, dues or referral hall fee payment only entitles a member or hiring hall user to appear on any referral list generated by Respondent in that month, as long as the referent is coded in the TITAN computer system as being out of work and therefore eligible for referral. [ALJD 3:3:26-29, 5:4-6; GCX 6]. The ALJ erred by failing to quote directly from the rules themselves, which state that individuals must maintain their eligibility by "pay[ing] dues or referral fee[s] to [Respondent] by the last business day of each month during normal working hours and will not be referred until dues/fee(s) are paid for that month." [ALJD 3:21-23, 3:26-31; GCX 6 (page 1); Tr. 116-122, 151-152]. In 2017, Respondent's referral fee for the convention referral list was $65 per month, and Respondent's monthly membership dues for Freeman employees were also $65 per month. [ALJD 3:24-26; GCX 9; Tr. 39, 48, 116].

Pursuant to the referral hall rules, individuals are able to submit applications for the separate industry referral lists on Tuesday and Thursdays from 8:30 a.m. to 11:30 a.m. [GCX 6; RX 2; Tr. 111-112]. However, the ALJ erred by stating that Respondent's referral list application packet includes "a checkoff authorization form for members to authorize deduction of their membership [sic] from their paycheck and remitted to the Respondent by Freeman," and that "[n]onmembers who agree to checkoff receive a 'blue card,'" and that "Union members who agree to checkoff receive a 'white card.'" [ALJD 3:19-21, 4:3-4]. Rather, the record shows that the application packet consists of the actual hiring hall application form, a W-4 form, an I-9 form, the instruction forms for the W-4 and the I-9, and one of two optional forms, either a "white card" to apply for membership and to use to elect to have Freeman withhold via payroll deduction and remit their monthly membership dues, or a "blue card" for non-members to use to elect to have Freeman withhold and remit their monthly referral hall fees. [RX 1, 2; Tr. 111-115]. The "white card" is three-layered carbon-copy paper; the white and yellow sheets are returned to Respondent and the pink sheet is retained by the applicant. [RX 1]. The "blue card," in contrast, is actually two separate cards (both blue) – one for Respondent to retain and one for it to submit to Freeman. [RX 2]. Both the dues and referral fee checkoff authorizations are only revocable by the signer during a 15-day window each year. [RX 1, 2].

Freeman is, by far, the largest employer of convention-industry referents, and the only employer in that industry whose contracts with Respondent include a dues checkoff provision. [ALJD 3 fn 3, 4:1-6, GCX 7, 8; RX 5, 7; Tr. 42, 121-122].[7] In its entirety, that provision reads:

[7] Although Freeman has separate collective bargaining agreements with Respondent for "showsite" work and "warehouse" work, labor for both contracts is referred from the same convention-industry referral list. [ALJD 2:38-3:5; GCX 7, 8; Tr. 108-109].

Article IV
Check-Off

4.1 The Employer agrees to deduct monthly from the pay of each employee who signs and submits proper authorization and who is covered by this Agreement, the dues, initiation fees and/or uniform assessment of the Union and agrees to remit to said Local Union all such deductions within fifteen (15) days following the end of the month in which said deductions are made.

4.2 The Union agrees to indemnify and save the Company harmless against any and all claims, suits or other forms of liability arising out of the deductions of money for Union dues, assessments, fees or otherwise from an employee's pay. The Union assumes full responsibility for the disposition of the monies so deducted once they have been turned over to the designated Union official.

4.3 The Local Union shall certify to the Employer in writing each month a list of its members working for the Employer who have submitted the required authorization, together with an itemized statement of dues, initiation fees (full or installment), or uniform assessments owed and to be deducted monthly from the pay of each member.

[GCX 7, 8]. As noted above and by the ALJ, both members and non-members of the Union are able to avail themselves of this check-off service if they sign the appropriate check-off authorization card provided with their hiring hall application packet. [ALJD 4:1-4; RX 1, 2; Tr. 111-112, 114-116].

The ALJ erred by finding that "[t]he referral rules include a statement that dues or fee payments are a personal responsibility, regardless whether a person makes payment via checkoff." [ALJD 3:38-40]. Rather, the referral rules state, "Individuals must pay their dues or referral fee(s) to the Local Union by the last business day of each month during normal working hours and will not be referred until dues/fee(s) are paid for that month." [GCX 6]. Moreover, as the ALJ later quotes directly a "Notice to All Members" on the back cover of the showsite collective bargaining agreement with Freeman, hiring hall users are given the following instruction: "If you are on a dues check-off with your company and leave for any reasons and dues are not deducted, it is your

responsibility to keep your dues current or request a withdrawal card from the local Union office."[8] [ALJD 4:14-19; GCX 8]. This statement does not address the situation in which dues *are* deducted from the referent's paycheck pursuant to a dues checkoff agreement. The only instruction about "personal responsibility" is an allegedly verbal one made by Grajales and/or Stapleton when a referent submits an application with their advance payment of two months' worth of dues or referral fees - $130 for the convention industry referral list. [Tr. 98].

According to the written hiring hall rules, the convention referral list operates on a rotation basis: individuals who have worked the least recently should appear at the top of the list, and those who worked most recently – or who are registering for the first time – should be at the bottom. [ALJD 5:2-4; GCX 6 (page 3), 11(a), 11(b); RX 6, 8]. People currently working on a convention referral are not eligible to be referred for additional work. [ALJD 5:4-6; GCX 6 (page 3)]. As noted, individuals are not eligible to be referred unless and until they pay dues or hiring hall fees for the given month. [ALJD 3:28-29, 4:9-10, 5:4-6; GCX 6 (page 1)]. The ALJ erred by finding that "[t]here are no penalties for a late or delinquent payment." [ALJD 3:32-33]. It is true that Respondent does not apply any additional financial obligations for late or delinquent payment of hiring hall fees by non-members, and that a payment made in any given month will be applied to that month first, with any additional monies received at the same time applied to future months. However, there is a penalty insofar as referents will not actually be offered work until Respondent prints a new referral list in TITAN – even though they are eligible to be referred according to the referral rules from the moment payment is made – unless Grajales manually adds their name to an existing list herself.

[8] GCX 8 is a copy of what appears to be a booklet-sized (approximately 8.5" x 5.5") version of the showsite collective bargaining agreement; thus, this Notice is apparently the back cover of the bound original.

This is because, in reality, Stapleton generates a referral call list in TITAN only when Grajales requests one, such as when Grajales has "exhausted" one or when Grajales wants a new list after a bulk dues remittance is received from Freeman. [ALJD 5:26-27, 5 fn. 12; Tr. 52, 56, 89; GCX 11(a), 11(b)]. The referral list queries TITAN for all registered convention list hiring hall users who are a) "current" on their dues through the month in which the list is generated, and b) not shown as of that date as being already out on a dispatch. [ALJD 5:26-27; GCX 11(a), 11(b); RX 4, 6, 8; Tr. 52, 60, 62, 75-76, 128-130]. Moreover, Respondent does not disqualify referents from the list if the work will occur in a later month (after the month in which the list is generated and the referral call placed), but their dues are not yet paid for the month in which the work will occur. [Tr. 86-88]. For example, when the list is printed in December, but the work will not begin until January, Grajales does not limit her calls to only those referents who are paid through January; referents who have only paid through December receive her call. [GCX 11(a), 11(b); Tr. 52, 60, 62, 75-76, 128-130]. Once the referral is committed, Respondent does not later revoke it if the referent fails to pay dues/referral fees by the first of the month (i.e. January) in which the work actually occurs. [Tr. 86-88, 112].

Respondent does not notify referents when TITAN shows them as behind on dues or referral fees at any point on its own initiative. [ALJD 3:33-34, 5:18-19, 5:27-29; Tr. 70-71, 85, 98]. TITAN does not check, and the human operators of the hiring hall do not verify, whether an employee with a valid check-off authorization on file with Freeman is performing work for Freeman that will result in dues or referral fees incoming by the 15th of the following month. [ALJD 5:10-12; Tr. 122-123, 152-153].

Grajales receives hiring hall labor requests from Freeman and other convention employers by fax and, occasionally, email. [RX 5, 7; GCX 10(c); Tr. 51-53, 98, 100]. Freeman is also

contractually entitled to establish a "priority list" of workers whom it can contact directly, without going through Respondent. [ALJD 3:16-17; GCX 7 (pages 7-8); Tr. 79, 93-94]. When Freeman submits a labor referral request to Respondent, the names of any priority list workers assigned to the job are typically pre-filled into the request form by Freeman; the additional labor needs are indicated by a blank numbered list for Respondent to fill in and return. [RX 7; Tr. 143-144]. Shepard is also apparently entitled to request referents by name, but Respondent contacts these individuals and records their dispatch in TITAN, unlike the Freeman priority employees. [RX 5 (pages 32-33, 75-76, compare to Freeman referral with both priority and non-priority employees at pages 26-27)].

Grajales calls potential referents in the order they appear on the TITAN-generated list and offers them the available work. [ALJD 5:14-16; GCX 11(a), 11(b); RX 4, 6, 8; Tr. 56-58, 76-91]. Grajales makes notes on the list as she makes the calls, such as the referent's start date and location for accepted work; whether they are unavailable due to other work; or if and when she left a message. [GCX 11(a), 11(b); RX 4, 6, 8; Tr. 76-83]. From time to time, Grajales adds handwritten names to the middle of the referral list she is currently using to make referral calls, and then refers those individuals to work, although the basis for doing so is not always recorded. An example of this can be found on RX 6, a call list used by Grajales for early-November work referrals that was generated on November 1. At the bottom of page 4, she wrote a notation that an individual named Steven McCuen ("McCuen") paid his dues, and inserted him into the list; he was initially referred to Freeman for work to occur on the afternoon of November 3.[9] In contrast, a few names below McCuen, on page 5, Grajales inserted Elizabeth Ortiz ("Ortiz") without noting an explanation. She then proceeded to call Ortiz at least twice, leaving her two voicemail messages about available

[9] The November 3 job ended up being canceled by Freeman that morning. [RX 5 (pages 18-19)]. McCuen was then subsequently assigned to be a steward on a small Freeman dispatch on November 10. [RX 5 pages 78-80].

work. [RX 6 (page 5)]. Regardless, this establishes that late payment of dues does not automatically relegate the referent to the bottom of the rotation-based list, and it was error for the ALJ to omit these facts from her decision.

Grajales also writes "dues" next to individuals that are about to lapse on their dues in the next month, even though, she testified, she does not affirmatively notify those individuals about their dues status when calling them with a referral. Instead, she said she will either answer them if they ask her directly about their dues status, or refer them to "the dues person," the bookkeeper. [ALJD 5:20-22; Tr. 83-85]. Moreover, even though Respondent does not withhold a work referral from someone who will not be current in the month the work occurs – as long as their dues or referral fees were current at the time the list was generated and the referral call was made – Grajales nonetheless will make notations on the list updating individuals' "Pd thru" date when they "show her a receipt" of their payment. [e.g., GCX 11(a) (pages 1, 4, 7, 9, 12-15); Tr. 86-88, 121]. Thus, it was error for the ALJ to summarize Grajales' notations as "indicating when Freeman remits dues to the Respondent via checkoff." [ALJD 5:19-20]. This is at best an incomplete statement, as the remittance by Freeman happens in a lump payment on behalf of all hiring hall users, and all check-off payments are input at one time by the bookkeeper; the available evidence shows that Grajales will make a reference to a Freeman dues payment at the top of a list, to record why she generated a new list in the middle of a referral call process. [GCX 11(a), 11(b)]. Grajales' myriad notations are relevant to the record, and it was error for the ALJ to disregard them in her factual findings.

After a sufficient number of people have accepted work to fill the labor order, Grajales gives a copy of the job order with a handwritten (or sometimes typed, for larger jobs) list of referents who accepted work in each position to Stapleton, who inputs the information in the "dispatch" section of the TITAN database, showing the employer, each individual's start date, and

their job designation, e.g., general labor, forklift, or driver. [GCX 10(a), 10(b), 11(a), 11(b); RX 5; Tr. 52, 98-99]. Stapleton then prints out a record entitled "Job Order/Dispatch Record" which is kept in hard copy as a cover page with the other materials related to filling the labor request in the Union's files. [GCX 10(a), 10(b), 10(c); RX 5; Tr. 52].

In general, at the conclusion of a job, Grajales receives a sheet from Freeman, letting her know the date it terminated those employed on that dispatch order. [Tr. 91]. Sometimes, the Union steward on the job will let Grajales know by telephone that some people were released early. [Tr. 91-92]. The reported termination date gets recorded on the original dispatch sheet by hand, and input into TITAN; it then becomes the "SI date" used by TITAN to achieve the rotational (first-in, first-out) nature of the referral list.[10] [ALJD 5:1-7, 5 fn. 7; GCX 11(a) and 11(b); RX 5, 6, 8; Tr. 59-60, 64-66, 91-92]. However, Respondent uses the date it was notified that a person no longer had work, not necessarily their actual last day of work. [Tr. 92]. This may lead to lags of several days and opens the process to outright manipulation. For example, workers who work on October 20 and 21 only, can be recorded to have a termination date of October 26. [GCX 2, 5; RX 8]. The ALJ erred by failing to find this, and by stating instead that referents are "automatically" returned to the end of the rotation at when they finish work assignments. [ALJD 5:6-7].

B. Charging Party Caraballo's Dues and Referrals from July to December 2017. Exceptions 29 through 44.

Charging Party Doris Caraballo ("Caraballo") has obtained work with Freeman and other convention industry employers through Respondent's hiring hall for many years, and has a signed

[10] Referents who are currently working do not have an "SI Date" and thus are excluded from the query when Stapleton generates a new referral call list. [RX 3, 4; Tr. 125-130].

dues check-off authorization form on file with Freeman that was signed on February 9, 2015. [ALJD 6:7-8; Tr. 98; RX 1]. Caraballo is not on Freeman's priority list. [ALJD 5 fn. 8; GCX 2].

While noting that Caraballo paid her September dues by personal check on August 31, the ALJ erred by failing to find that the Charging Party, Doris Caraballo (Caraballo) did not perform any work for Freeman in July or August 2017. [ALJD 6:8-10; GCX 2, 3, 9, 12(c)]. In late September, Respondent referred her to work with Freeman for September 28 and 29. [ALJD 6:10-11; GCX 2].

Caraballo paid October dues by electronic check on September 25. [ALJD 6:11-12; GCX 9, 12(c)]. Caraballo was again referred to work with Freeman for October 5. [ALJD 6:12-13; GCX 2]. On October 6, Freeman issued Caraballo and others paychecks for the week of September 25 through October 1, i.e., for her work on September 28 and 29. [ALJD 6:15-16; GCX 3, 12(c)]. Dues were withheld from Caraballo's paycheck. [ALJD 6: 15-16; GCX 3, 12(c)]. Freeman did not remit these dues to Respondent when it sent withheld monies from September paychecks on or about October 15. [ALJD 6:18-19; GCX 9]. Caraballo received a paycheck for her October 5 work on October 13; no dues were withheld from it. [ALJD 6:17; GCX 3].

Respondent referred Caraballo for another forklift job for October 20 and 21 on a Freeman show called "American Society of Human Genetics" ("the Genetics" show), and received the corresponding paycheck, again with no dues withheld, on October 27. [ALJD 6:21-28; GCX 2, 3, 4]. Several other employees also worked on the Genetics show only on October 20 and 21 – i.e., were sent on the same referral as Caraballo: Christopher Cobb (general labor), Maxo Estinvil (forklift), Isabel Hernandez (general labor), Diana Millan (general labor), Pedro Osorio (forklift), Alba Palomino (general labor), Matthew Rausch (forklift), Alex Santiago (forklift), Nina Thomas (forklift), and Hector Velez (forklift). [ALJD 6:21-28; GCX 4, GC 5]. Herein, these ten

individuals will be referred to collectively as Caraballo's comparators, since they all "returned" to Respondent's referral list at the same time as Caraballo and thus, according to the rotation system used by Respondent, held roughly equivalent positions on the referral list at that time. [RX 8, pages 9-10].

There is no record evidence that any of the comparators are on Freeman's priority list. [GCX 5; RX 5 (pages 56-64)]. The ALJ erred by finding as a matter of fact that Alex Santiago was a Freeman "priority list" employee, mistakenly conflating him with another individual, Ruben Santiago. [ALJD 6:30-37, 11:23-25]. The record evidence proves that these are two different people. [RX 3 (page 2, 36); RX 5 (page 1)]. Ruben Santiago, a priority list member, no longer needs to be referred to work to Freeman, and therefore ceased paying dues to Respondent in August 2017, and was last referred through the rotational system in June 2017 – but he was summoned as a priority worker on later dates, for example, November 1, to Disney's Wide World of Sports to work for Freeman as a general laborer for a "Disney Wine & Dine" event. [RX 3 (page 36), RX 5 (page 1)]. Alex Santiago, meanwhile, is not a priority worker. [Tr. 32-33; GCX 5(i)]. This is most clearly evinced by his separate appearance in the rotational system and his coding, on the Freeman payroll records, not as a priority worker, but as a referent. [GCX 4, 5(i)]. Freeman's Orlando office manager, who handles payroll, testified that the final column of Freeman's payroll spreadsheets, "Grd," refers to the pay grade, and that a "05" value in that column indicates priority, while other codes indicate referrals to either forklift ("04") or general labor ("01") showsite referrals. [Tr. 24-25, 32-33]. Priority workers' duties are not distinguished on the payroll, even though they are referred as either forklift or general labor. [GCX 4; RX 5; RX 7].

On October 26, Stapleton generated a call list for Grajales that was used to make referral calls for work on October 27 and 28. [RX 8]. Many individuals on that list, including Caraballo

and the comparators, whose SI date was listed as October 26, were not called. [RX 8]. The ALJ erred by failing to include the fact that this list was generated, and that the comparators and Caraballo had an SI date of October 26 at that moment in time. [ALJD 6:21-37].

On November 1, Stapleton generated a call list which Grajales used to fulfill labor orders for several Freeman shows, including an order for 50 forklift drivers and 28 general laborers on a show called "IAAPA." [ALJD 6:30-32; RX 5, 6]. Caraballo did not appear on the call list because Respondent had not yet received her withheld dues from Freeman; Respondent did not notify Caraballo of the alleged deficiency. [ALJD 6:32-34; RX 6; Tr. 73, 97-98]. Amongst those who were a) on the November 1 list, b) received calls from Grajales, and c) were referred to work on IAAPA, were eight of the ten comparators: Christopher Cobb (general labor), Isabel Hernandez (general labor), Diana Millan (general labor), Pedro Osorio (forklift), Alba Palomino (general labor), Matthew Rausch (forklift), Nina Thomas (forklift), and Hector Velez (forklift). [ALJD 6:35-37; GCX 5(a), 5(c), 5(e) through 5(h), 5(j), 5(k); RX 5, 6 (page 5)]. Additionally, comparator Alex Santiago drove a forklift on IAAPA, but his name did not appear on the call list generated on November 1. [ALJD 6 fn. 16; GCX 5(i); RX 5, 6]. Like Caraballo, Santiago appears on the October 26 call list showing his dues paid through "2017-10" as of that date. [RX 8 (page 9)]. However, unlike Alex Santiago, Caraballo did not work on IAAPA. [GCX 2].

Because of the case of mistaken identity, the ALJ erred in concluding as a matter of law that Alex Santiago was not a similarly-situated comparator of Caraballo, and, by extension, failing to find as a matter of fact that Alex Santiago worked for Freeman on the "IAPPA" show without appearing on the referral call list for that show. [ALJD 6:30-37, 11:23-26, 11:37-43]. The ALJ found that the absence of evidence of Alex Santiago having paid his November dues was insufficient to prove that he had not paid them – but the record is clear that the only reasons a

referent registered with the hiring hall will not appear on a referral call list are (1) they are already working, (2) they are not current on their dues, or (3) they request to be removed altogether. Alex Santiago's Freeman payroll record covering the relevant time period proves he was not performing work for them, and from the fact that he worked on IAPPA, and on subsequent shows, it can reasonably be inferred that he did not request to be removed from the referral list. Although there are other employers that use the convention referral system, Respondent submitted documents that it purports show all of its referrals made for work from November 1 to November 16, and Alex Santiago does not appear on any of them – Freeman or otherwise – except as #25 on the IAPPA referral for November 9.[11] [RX 5 (page 57)]. Moreover, the last list generated prior to November 1, on October 26, shows Alex Santiago down with the rest of the comparators towards the bottom of the referral rotation – for him to have been removed from the referral system due to working on November 1 would have meant Respondent then acted in bad faith by referring Alex Santiago out of turn. [RX 8]. Thus, the only explanation for his absence on the November 1 list is his failure to pay dues by the time it was generated. [RX 6]. As noted above, Grajales inserted at least one individual who did pay his dues, Steven McCuen, onto the list. [RX 6 (page 4)]. No similar insertion was made for Alex Santiago.

Therefore, Respondent either acted in bad faith by referring Alex Santiago without receiving his dues payment, or acted in bad faith by referring Alex Santiago to work out of turn and without keeping proper records of the referral. There are no other reasons his name would not appear – either printed or handwritten – on the referral list, but he would still be included on the dispatch record and paid by Freeman for work performed at that event as a referred forklift driver,

[11] A third individual with the surname "Santiago" was referred to Shepard, as a requested-by-name referral, on November 7 and 14, but he is definitively a separate person; Angel Santiago appears on page 8 of RX 3, the complete list of registered convention list referents.

code "04." [GCX 5(i)]. It was therefore an error for the ALJ to fail to conclude that Respondent referred Alex Santiago for IAPPA even though his name was not on the referral list generated by TITAN and used by Grajales for that show, and even though he had not paid his dues as of the time she made the referral calls. [RX 6].

At 4:01 pm on November 8, the first day of the IAAPA showsite work, Caraballo emailed Stapleton and Gonzalez asking for Respondent's fax number so she could send her records showing that she was paid through November. [ALJD 6:39-7:1; GCX 12(a)]. The next morning, Stapleton replied that Respondent's records showed Caraballo was paid through October but still owed for November. [ALJD 7:2-3; GCX 12(a)]. Caraballo responded in turn with an attachment showing the cancelled September and October dues checks from her bank and the October 6 Freeman paystub. [ALJD 7:3-4; GCX 12(a), 12(c)]. Stapleton responded with the following explanation:

> Yes, you did come in on 8/31/17 and paid dues for the month of September 2017, you came on 9/25/17 and paid dues for the month of October. We did not receive any dues on you in October from Freeman. The dues that were deducted from your check for the show that went from the [sic] 9/26-10/01/17 will not arrive until the 15th or 16th of November. Being that the show ran through October 1st the dues were technically taken in October. As you know the dues arrive around the 15th of the following months they were deducted in. In this case they won't arrive until November around the 15th. Which means you will be off the list for work until the dues arrive since we are already in the month of November. Right now you are currently not on the list until you pay for the month of November. Thank you and have a good day.
> [ALJD 7:6-11; GCX 12(a)].

On November 16, Respondent recorded the dues received from Freeman from employees' October paychecks, including the $65 withheld from Caraballo's October 6 paycheck. [ALJD 7:14-15; GCX 9; Tr. 72]. Respondent did not call Caraballo and offer her any work referrals from Freeman during the month of November. [GCX 2]. However, the ALJ only found that Respondent made no work referrals to Caraballo from November 1 through 10, even though Respondent admits

it would not have made any referrals for her until after it received her dues payment from Freeman on November 16, and there is no evidence of referrals to other employment during that time. [ALJD 7:13-15]. The comparators who did work on IAPPA concluded that job on November 19 and were subsequently given an SI date of November 21, ostensibly behind Caraballo, whose last day of work had been October 21 and whose last recorded SI date was October 26. [GCX 5(a), 5(c), 5(e) through 5(j), 11(a) (pages 5, 7-9), 11(b) (pages 6, 9, 10); RX 8 (page 10)]. The ALJ erred by failing to include this fact in the Decision.

Respondent did not notify Caraballo that she was delinquent on dues once more as of December 1. Nonetheless, on December 4, Caraballo paid December dues from her checking account. [ALJD 7:22-23; GCX 9]. Grajales did not call Caraballo with any referrals for work to occur in December, either before or after December 4. [GCX 2]. Comparators Pedro Osorio and Nina Thomas worked general labor on the "National Forum on Quality Improvement" show on December 9, 11, and 13. [GCX 5(f), 5(j)]. Alex Santiago worked forklift on the "Composites Advanced Materials" show on December 14 and 15; and Diana Millan and Hector Velez worked general labor on the Composites show on December 15. [GCX 5(e), 5(i), 5(k)]. The record does not evince how far in advance the referral calls for this work were made. The ALJ erred by failing to describe these referrals, as Caraballo should have been ahead of these individuals on the rotation. [ALJD 7:20-25].

On December 18, Grajales began making calls for the "Homebuilder" show, with the first wave of workers due to report beginning on about December 27. [GCX 11(a), 11(b); Tr. 88]. Two call sheets were used for this referral; although neither Stapleton nor Grajales remembered which one was printed first, the documents speak for themselves: GCX 11(b) was first, and GCX 11(a) was second. Grajales generated GCX 11(b) first, and wrote that Respondent had received a dues

payment from Freeman, to indicate that it was ostensibly an up-to-date list. [GCX 11(b) (page 1)]. However, several of the comparators were working shortly before this list was printed, and their SI dates still showed as November 21. [GCX 11(b) (pages 6, 9, 10)]. Grajales seems to have realized the error after making calls from the list; next to Nina Thomas and Pedro Osorio's lines, she wrote a note that appears to indicate that they "shd be hidden" because they were already been out at a job. [GCX 11(b) (page 6)]. Meanwhile, Caraballo, Maxo Estinvil, Diana Millan, and Hector Velez did not appear on the first list at all. [GCX 6].

That same day, Grajales and/or Stapleton then updated TITAN with new termination dates, and regenerated the list with a more appropriate SI date for Diana Millan, Pedro Osorio, Nina Thomas, and Hector Velez: December 18. [GCX 11(a) (pages 14)]. Caraballo and Maxo Estinvil – both of whom had not worked for Freeman since the Genetics show in October – were also inexplicably assigned an SI date of December 18. [GCX 2, 5(b), 11(a) (page 13)]. Christopher Cobb, Isabel Hernandez, Alba Palomino, Matthew Rausch, and Alex Santiago retained the date of November 21. [GCX 11(a) (pages 5, 7, 9)]. Subsequently, Caraballo and eight of the comparators (Christopher Cobb, Maxo Estinvil, Diana Millan, Pedro Osorio, Matthew Rausch, Alex Santiago, Nina Thomas, and Hector Velez) were all offered work to begin on January 2, 2018. [ALJD 7:24-25; GCX 11(a) (pages 5, 7, 13, 14)]. A ninth comparator, Isabel Hernandez, instead began work on December 30 on a different show, "ASI," after Grajales had left her a message about a referral on December 18. [GCX 5(c), 11(a) (page 9)]. Although the ALJD notes the work commencing on January 2, 2018, it was error to omit Isabel Hernandez's work assignment commencing December 30, as well as evidence of the erroneous SI dates on the call sheet and the fact that numerous other referents with SI dates after October 26 (i.e., after what Caraballo's date should

have been) were offered work to start in late December rather than early January. [ALJD 7:20-25].

IV. ARGUMENT

A. Respondent owes Caraballo and other hiring hall users a fiduciary duty to notify them of dues delinquency before withholding work opportunities from them, at the very least, in the first instance of a dues or referral fee lapse, and in any situation where Respondent's own referral records permit a reasonable inference that dues have already been withheld from the referent's paycheck. Exceptions 45 through 47, 52, 53, and 56.

Respondent has established an exclusive hiring hall procedure whereby it demands that users begin – and, it apparently hopes, indefinitely remain – at least one month ahead on their dues/referral fee payments, in an attempt to reduce the impact of its shirking of its fiduciary duty to the hiring hall users, i.e., its refusal to notify them of delinquency before denying them work referrals. *Carpenters Local 563*, 272 NLRB 1249, 1255-1256 (1984); *Radio-Electronics Officers Union*, 306 NLRB 43 (1992), enf. denied, 16 F. 3d 1280 (D.C. Cir. 1994).

In *Carpenters Local 573*, 272 NLRB 1249 (1984), the Board held that an exclusive hiring hall operated by Local 563 unlawfully prevented two carpenters, Vargas and Hernandez, from obtaining referrals within its jurisdiction due to unpaid dues in nearby sister Locals, with whom Local 563 was party to the same Master Labor Agreement with area employers, because Local 563 "fail[ed] to offer Vargas and Hernandez reasonable opportunity to satisfy their dues obligation before denying them referrals." 272 NLRB at 1249, fn. 1. The Board affirmed the reasoning and conclusions of the ALJ on this theory:

> It is well established that the existence of a contractual union security clause inevitably leads to employee dependence on a labor organization and that there necessarily arises out of this dependence a fiduciary duty that the labor organization deal fairly with employees before invoking the provisions of such a clause. *NLRB v. Hotel Employees Local 568*, 320 F.2d 254, 258 (3d Cir. 1963). Among the requirements of this duty is that the labor organization must afford employees a reasonable opportunity to comply with whatever obligations are imposed by a lawful union security clause. *Teamsters Local 572 (Ralphs Grocery)*, 247 NLRB

934, 936 (1980); *Teamsters Local Union 105 (Delta Lines)*, 242 NLRB 454, 455 (1979). As stated above, a labor organization's right to refuse to dispatch an individual is predicated on its right, pursuant to a lawful contractual union security clause, to require immediate discharge of that individual for failure to pay his membership dues. *Mayfair Coat & Suit Co.* [140 NLRB 1333 (1963)]. Since in both instances the delinquent individual is being denied employment (at all or continued), it appears to be entirely reasonable and appropriate to hold by analogy that the labor organization owes him the identical fiduciary duty of fair dealing […]. In this regard, while the individual's employment is directly affected in the union security clause context and indirectly affected in the refusal to dispatch context, the effect in both cases is the same. Further, I reach this conclusion fully cognizant of the unique problems attendant to a labor organization's operation of an exclusive referral and hiring system, noting that time is of the essence in most dispatch situations, that delay would tend to disrupt the operation of contractors who rely on the hiring hall for obtaining workers, and that the internal hiring hall procedures may well be disrupted by the obligations imposed by said fiduciary duty. *Plumbers Local 669 (Best Fire Protection)*, 268 NLRB 1218, 1220 (1984). [Although] Respondent offered no evidence that the dues-paying requirement was necessary for the operation of the hiring hall, […] **such concerns are outweighed in my view by the labor organization's otherwise unfettered ability to affect applicants' livelihoods by refusals to dispatch, noting especially [Local 563's] right – which I have upheld – to deny referral to applicants who are delinquent in dues payments to sister local unions affiliated with the Los Angeles County District Council of Carpenters. Whatever burdens imposition of the above fiduciary responsibilities cause must be concomitant with the authority and power exercised by the labor organization through operation of a hiring hall.** Therefore, in the context of these cases, as to Vargas, I find that on September 7 business agent Graves was under a fiduciary duty to have at the least offered the former some reasonable period of time in which to have complied with his membership dues obligation to Local 25 before denying him dispatch for not having as yet done so [footnote omitted], and as to Hernandez, Respondent's agent Miller was under identical opportunity to have afforded Hernandez an opportunity to settle his dues delinquency to Local 1052 prior to refusing him a dispatch. […] Respondent argues against any violation herein, contending that, as a practical matter, Vargas and Hernandez each had no money with which to pay his dues and that each desired dispatch based on a temporary work card which Respondent was under no obligation to accept in lieu of proof of current dues payment. […] **Respondent's fiduciary responsibility to Vargas and Hernandez was positive, an affirmative one, and cannot be excused by what perhaps would have been the result had Respondent made the necessary offers of time to them.** *Western Publishing Co.*, 263 NLRB 1110, 1112 (1982). Further, the above practical circumstances do not establish that Vargas willfully or deliberately sought to evade his dues obligation; at the most, such demonstrates his mistaken reliance on the believed use of the [temporary] cards [and the same for Hernandez]. […] Accordingly, I believe that Respondent violated Section 8(b)(1)(A) and (2) of the Act by refusing to dispatch Vargas and Hernandez based on their respective dues

> delinquencies […], without affording them the opportunities to satisfy said obligations.

272 NLRB at 1255-1256 (emphasis added).

At the hearing, Respondent cited *Radio-Electronics Officers Union v. NLRB,* 16 F. 3d 1280 (D.C. Cir. 1994), which found a union security clause necessary for finding this fiduciary duty. Admittedly, there is no argument that in this right-to-work state, Respondent's contracts with Freeman or any other employer include a union security clause. However, it is well-settled that Board administrative law judges are bound to follow Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by lower federal courts. *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984). In *Radio-Electronics Officers Union*, the Board had found that the union had a duty to notify members and other applicants for employment of any dues or fees they owe before removing their names from its referral registers, without a union security clause in the collective bargaining agreement. 306 NLRB 43 (1992), enf. denied, 16 F. 3d 1280 (D.C. Cir. 1994). Thus, although the Circuit Court for the District of Columbia rejected this approach in cases without a contractual union security clause once 25 years ago, both *Carpenters Local 563* and *Radio-Electronics Officers Union* remain good Board precedent supporting a conclusion that the absence of a union security clause does not annihilate Respondent's fiduciary duty to its hiring hall users. It was error for the ALJ to ignore this precedent, even as she acknowledged the requirement of *Pathmark* that she do so. [ALJD 7:31-12:10].

The Board's reasoning on this issue in the past is sound. Where, as here, a union operates an exclusive hiring hall with mandatory referral fees (in the same amount as membership dues), referents are entirely dependent upon the hiring hall for their employment opportunities by design. Although they are not required to be members, hiring hall users must nonetheless pay referral fees

each month – fees which, it should be noted, are the same amount as Respondent's membership dues. It is virtually analogous to a traditional employer with a regular contingent of employees being asked to discharge one of them for failing to adhere to the union security clause – if Respondent does not get paid, the referent does not get their employment opportunity. See, e.g., *Teamsters Local 1150 (Sikorsky Aircraft)*, 323 NLRB 1173 (1997) (union violated Section 8(b)(1)(A) and (2) by ceasing to send certified letters to bargaining unit employees that had previously warned them of 15 days' delinquency in their dues or agency fees pursuant to a union security clause and that they had 15 days to pay the fees or else action would be taken, citing the expense of such letter; then subsequently successfully requesting that an employee be discharged without notifying the employee of the alleged delinquency). In the union security clause context, notice and a reasonable opportunity to correct is required for the union to avoid liability for a violation. It is reasonable that the Board has, in the past, and should here, apply this same fiduciary duty to an exclusive hiring hall.

The ALJ subscribed to Respondent's argument that it cannot be held to the fiduciary duty described in *Carpenters Local 563* because its TITAN system has been programmed to exclude from the out-of-work list registrants who have not paid monthly dues, and improperly concluded that Respondent had established a "necessity defense." This argument is wholly without merit.

First, as a local affiliate of the International Brotherhood of Teamsters, TITAN is Respondent's system, and Respondent is responsible for the results generated by TITAN. TITAN is nothing more than a tool Respondent uses to fulfill its hiring hall obligations to employers and its duty of fair representation to its hiring hall users. If the tool falls short of that duty, Respondent cannot continue using it, violating the rights of its hiring hall users, simply because it would have to go to its International to get the tool fixed.

Second, the "out-of-work" list at issue here, analogous to the "out-of-work" list in *Carpenters Local 563*, is not the list generated by TITAN on demand when Grajales asks for it: it is the entire list of registrants stored within the database, including those registrants who have failed to pay dues in any given month, as long as they are, in fact, out of work. In order to fulfill its fiduciary duty, Respondent must notify hiring hall users of referral opportunities and, if necessary, provided an opportunity to correct any dues deficiencies *before* being ruled ineligible for referral. The violation here has occurred because Respondent has collapsed these two separate lists – the out-of-work list and the eligible-for-referral list – into one, in lieu of using a dues paid card or other receipt mechanism to verify from the *potential referent* that they have satisfied the financial obligation and, barring that satisfaction, giving them the requisite reasonable amount of time to do so, as in *Carpenters Local 563*. Thus, at the first opportunity for a referral after its records show that a hiring hall user has fallen behind in their dues/referral fees, Respondent, as the fiduciary who controls the valve of employment opportunities, must offer them a chance to correct the deficiency before denying them the referral. *Carpenters Local 563*, 272 NLRB at 1255-1256; *Radio-Electronics Officers Union*, 306 NLRB 43 (1992), enf. denied, 16 F. 3d 1280 (D.C. Cir. 1994). Respondent admits that it fails to do so and thus, breaches its fiduciary duty to hiring hall users and violates Section 8(b)(1)(A) and (2) of the Act. The ALJ failed to properly consider this point in her analysis.

Despite President Clay Jeffries' protests that he would need to hire one or two full-time staff members to monitor TITAN and contact referents about their dues, all of the information Respondent needs to implement this is available to it in the existing TITAN framework and referral hall procedure. The queries to generate the referral list could be set to include people whose dues/referral fees were paid for the prior month as well as those in the current month, instead of

just those in the current month, resulting in perhaps a few dozen additional names.[12] If Respondent cannot make this change to the query parameters itself, all it need do is contact its parent labor organization and tell them it is necessary in order to comply with a Board order and its fiduciary duties to its members. Grajales would then call referents in order, as she does now, tell them there is work, and, if there is a need, to pay additional dues/referral fees to be eligible for additional referrals in the future.[13] Adding, at most, a few more sentences to *some* of the referral calls, in order to ensure that referents are able to access work opportunities they might otherwise miss due to the byzantine delayed remittance system, cannot possibly cause such a burden on Respondent that it negates their fundamental fiduciary duty in operating a hiring hall. The referral process

[12] RX 3 includes all registered convention list referents. RX 4 is a list of all registered convention list referents who would have been eligible for a work referral on June 12, 2019, the day before the hearing. Although, on RX 3, the list of all those paid through May 2019 (the month before the list was printed) runs 21 of the exhibit's 115 pages, an actual referral call list generated with a paid-through-the-month-before parameter would be far shorter, including only those people with an "SI Date," indicating their actual out of work status. For example, Caraballo, who appears on page 11 of RX 3, does not appear anywhere on RX 4 because on June 12, 2019, she was not eligible for referral since she was already out on a job – as indicated on RX 3 by her lack of an SI date. RX 4 is only 93 names (8 pages) long; a call list including extra paid-through-May 2019 out-of-work referents would include 41 additional names.

[13] Even if Respondent were only required to provide a reasonable amount of time to correct the deficiency before dispatching the referent to the present referral, Grajales could then give each referent a reasonable period of time to effectuate the payment or explain that the dues have been withheld from a participating check-off employer.

For example, Respondent receives notice of small jobs (those of less than 20 employees) at least 24 hours in advance of the job. Thus, if, say, only five people are needed, allowing a few hours for a "delinquent" individual to report to the hiring hall and make their payment cannot possibly hold up Grajales' dispatching process that much. It is reasonable to infer that, if Grajales calls someone and says, "There is work but you have to get current on your dues within two hours," the person will either respond that they will, or that they won't. If they say they won't, Grajales moves on to the next individual on the list, the same as she would if the referent rejected work for any other reason. If they say they will, Grajales can tentatively record them as the referent for the job and move on to her next task.

If the individual ends up missing the deadline, Grajales can treat it as a new request that pops up for work that will start prior to the work she is currently making calls for – a situation that actually happened with one of the comparators, prior to the IAPPA show, Matthew Rausch. Rausch appears on page 5 of the call list; his work referral is "FL OCCC 11/3/17." Some of the names before him, and all of the names after him, are referred for OCCC work commencing on November 8 instead. The reason for this can be found on the referral requests – page 6 of RX 5. On November 2, at 7:33 a.m., Freeman employee Carrie Owens emailed a last-minute request for an additional forklift driver for the November 3 call. Rausch happened to be one of the first people Grajales called on the morning of November 2; her notes indicate that she left a voicemail for Scott Buechel, seven names above Rausch, on the afternoon or evening of November 1, and a voicemail for Elizabeth Ortiz, two names below Buechel and five names above Rausch, at 9:06 a.m. on November 2. Comparators Isabel Hernandez, Alba Palomino, and Diana Millan, whose names appear on the list between Elizabeth Ortiz and Matthew Rausch, had to be referred to the IAPPA dispatch, starting November 8, because they are only qualified as general laborers ("01"), not forklift drivers ("04"), based on their work histories. [GCX 5(c), 5(e), 5(g)].

would take slightly more time than it does at present, but the mild burden on Respondent is more than reasonable in light of the impact on the hiring hall users to whom it owes this fiduciary duty. Respondent bargained for the dues checkoff procedure in its collective bargaining agreements with Freeman (and other employers in other referral sectors), Respondent, not the hiring hall users, should bear the onus of the delayed remittance of withheld dues or referral fees pursuant to that procedure.

The ALJ failed to give adequate weight to this analysis, in part due the factual misunderstanding of TITAN and the referral process described above, and in part because she found that the General Counsel had not defined a "reasonable" amount of time for Respondent to be required to give hiring hall users prior to denying them the work opportunity. Right now, the amount of time is zero, and Respondent asserts that this is necessary for the operation of its referral process. Yet Grajales frequently offers work to people some time after making the initial call to them; when they do not answer and she has to leave a voicemail, they call back and are offered a work referral as long as the labor request has not yet been filled. In the meantime, the referent is at least made aware that the work opportunity exists.

Board law is clear: if a labor organization undertakes to operate an exclusive hiring hall, it owes specific fiduciary duties to hiring hall users. An inadequate rule nondiscriminatorily applied is still an inadequate rule. It was error for the ALJ to ignore this precedent, fail to perform this analysis, and unreasonably conclude that Respondent's fiduciary duties were outweighed by its purported "necessity defense." The Board should reverse this incorrect conclusion and find that Respondent, an exclusive hiring hall operator, has an obligation to notify its users of alleged financial delinquencies *prior* to denying them work opportunities.

B. Respondent breached its duty of fair representation to Caraballo by denying her work referrals made from November 1-16 and December 1-4, in violation of Section 8(b)(1)(A) and (2) of the Act. Exceptions 48 through 51, 54, 55, and 57.

The essential facts of this case are undisputed. Caraballo performed work for Freeman on September 28 and 29; her dues arrived in Respondent's coffers over 45 days after that work was completed. Freeman, not Caraballo, was in possession of the $65 during all that time. Respondent knew or, at the very least, had access to the information in TITAN that her November dues would be remitted in November, because it had a record of Caraballo being dispatched to Freeman, a record of her dues checkoff authorization form, and a record of her last job there ending no later than October 26.[14] Respondent did not notify Caraballo that it had not received her November dues when it was making referral calls for IAPPA on November 1. Pursuant to the extant Board precedent governing the fiduciary duties of operators of exclusive hiring halls, Respondent's failure to notify Caraballo before denying her referrals made from November 1 through 16[15] and from December 1 through 4 violates Section 8(b)(1)(A) and (2) of the Act.

There is also some evidence that Respondent's specific failure to notify Caraballo of her dues delinquency and denial of work was arbitrary and in bad faith. As noted above in the fact section, one of the comparators, Alex Santiago, also did not appear on the November 1 call sheet; the October 26 call sheet permits an inference that the reason was that he had not yet paid his dues for November at the time it was printed and Grajales' calls were made. Yet, nonetheless, without any notation on the November call sheet, Grajales referred Alex Santiago to IAAPA as a forklift

[14] As noted above, Caraballo's actual last day of work in October was October 21. However, due to Respondent's practice of using whatever date it enters the termination into TITAN instead of the actual termination date, her SI date on November 1 was October 26.

[15] Complaint paragraph 6(a) alleges that the November dates were about November 1 through 10. The evidence clearly shows that Respondent did not return Caraballo to eligibility until, at the earliest, the point when it received her dues from Freeman on November 16. [GCX 1(i)]. Regardless, although the potential work happened after these dates, it is undisputed that the *referrals* for them occurred during the windows of November 1 through 10 and December 1 through 4, and it is the *referrals* that Caraballo missed that are the target of the Complaint allegations.

driver. [RX 5 (see Attachment 1 hereto), 6; GCX 5(i)]. Additionally, Grajales would sometimes write in other individuals' names and add them to the call list – see, e.g., Elizabeth Ortiz on RX 6, page 5, with no indication that her dues were paid, and who was also special insofar as Grajales left her two messages within half an hour in an attempt to give her a referral, ultimately successfully. [RX 5 (page 56); compare to Steven McCuen, discussed above]. In this respect, too, then, Respondent failed in its duty to represent Caraballo in good faith by arbitrarily treating her differently from these other hiring hall users.

The ALJ rejected the notion that, although the TITAN system is open to manipulation from human intervention, that there was any record evidence of Grajales or Stapleton actually doing so. However, the tale told by the various "SI dates" available in the record says otherwise. Most notably, when making calls for the "Homebuilder" show that began at the end of December and continued into January 2018, the list used by Grajales showed Caraballo and the other comparators with an SI date of December 18 – even though it is uncontested that Caraballo's last date of work was October 21. Even giving Respondent the benefit of the doubt, and allowing that perhaps Caraballo's sign-in date might instead have been December 4, the day she paid her dues, there is no reasonable explanation for her being sorted in the referral rotation as though she had just returned from a work assignment on the very day the referral list was printed. (As demonstrated above, the "SI date" should not apparently be the dues paid date, based on the insertion of Steve McCuen into the middle of the November 1 referral list, instead of at the end.) The evidence shows that Respondent can and does manipulate TITAN, and it was error for the ALJ to conclude that the possibility was not manifest as reality in the record.

For these reasons, because Respondent breached its fiduciary duty to Caraballo, and otherwise treated her differently than other referents for arbitrary reasons, Respondent should be

found to have violated Section 8(b)(1)(A) and (2) of the Act when it failed are refused to refer her to work with Freeman between November 1 and 16 and December 1 and 4, and order all appropriate relief to Caraballo and affirmative actions by Respondent to prevent future occurrences of similar violations. For the ALJ to conclude otherwise was error, and the Board should reverse her.

V. CONCLUSION

For the foregoing reasons, Counsel for the General Counsel respectfully urges the Board to grant Counsel for the General Counsel's Exceptions and modify the ALJ's findings, conclusions of law, and recommended Order to include complete remedies for all of Respondent's violations of Section 8(a)(1) of the Act, as described above.

Dated: January 24, 2020.

Respectfully submitted,

/s/ Caroline Leonard
Caroline Leonard, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, Florida 33602

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, **Brief in Support of Counsel for the General Counsel's Exceptions to the Decision of the Administrative Law Judge**, was served on January 24, 2020 as follows:

By Electronic Filing:

Hon. Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

By Electronic Mail:

Thomas J. Pilacek, Esq.
Thomas J. Pilacek & Associates
Winter Springs Town Center
158 Tuskawilla Road, Suite 2320
Winter Springs, FL 32708
tpilacek@orlandolaborlaw.com
gdavis@orlandolaborlaw.com
amalpartida@orlandolaborlaw.com

Doris Caraballo
1789 Quail Ridge Loop
Kissimmee, FL 34744
msdcaraballo@gmail.com

/s/ Caroline Leonard
Caroline Leonard, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, FL 33602
Phone: (813) 228-2641
Fax: (813) 228-2874
Email: caroline.leonard@nlrb.gov